SUPREME COURT U.S.
JUN 24
JOHN F.

No. 238

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

RIDGEWOOD MANAGEMENT COMPANY, INC.,
Petitioner.

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, THE FIFTH CIRCUIT

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Ridgewood Management Company, Inc., Petitioner, prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The intermediate Decision of the trial examiner dated January 29, 1968 (Appendix A, infra, pp. A1-A23) is not officially reported; the opinion of the National Labor Relations Board entered May 1, 1968 (Appendix B, infra, pp. A23-A26) is reported in 171 N.L.R.B. No. 31. The opinion of the United States Court of Appeals entered March 21, 1969 (Appendix C, infra, pp. A27-A30) is not officially reported.

JURISDICTION

1. The Fifth Circuit's opinion was rendered on March 21, 1969, and the judgment of the Court entered on April 14, 1969.

2. A timely Petition for Rehearing was denied on May 13, 1969.

3. The jurisdiction of the Court is invoked under the provisions of 28 U.S.C.A. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. **Whether the Consideration of Available Alternative Means of the Union to Carry Their Messages to the Employees, and the Showing That the No-Solicitation Rule Truly Diminished the Ability of the Union to Carry Their Messages to the Employees, Is Relevant in an Employer's Promulgation of a No-Solicitation Rule During Working Hours, on Company Premises?**

2. **Whether a No-Solicitation Rule During Working Hours on Company Premises Should Be Held Invalid and in Violation of 8(a)(1) of the National Labor Relations Act, Because of Various Types of Solicitation by Employees Ranging from Candy Sales for Cub Scouts to Church Donations?**

3. **Whether a No-Solicitation Rule During Working Hours on Company Premises Should Be Held Invalid and in Violation of 8(a)(1) of the National Labor Relations Act Because Petitioner Permitted a Labor Consultant to Interview Employees on the Premises During Working Hours?**

4. **Was There Substantial Evidence to Support a Finding of an 8(a)(1) Violation of National Labor Relations Act by Promulgation of a No-Solicitation Rule During Working Hours, on Company Premises?**

STATUTES AND REGULATIONS INVOLVED

Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C.A., Section 158, Page 326,

> "It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title;"

Section 8(c) of the National Labor Relations Act, 29 U.S.C.A., Section 158, Page 329,

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

STATEMENT OF THE CASE

This is a case pertaining to a promulgation of a no-solicitation rule during working hours, which was held in violation of Section 8(a)(1) of the National Labor Relations Act.

Petitioner is a Texas Corporation with its sole place of business in Beaumont, Texas. It is a motor hotel with rooms and a restaurant for guests.

On or about April 25, 1967, Petitioner posted the following no-solicitation rule:

> "No employee of the Ridgewood Motor Hotel is permitted to solicit union membership during working hours on the premises of Ridgewood Motor Hotel." (J.A. 46)

The no-solicitation rule was promulgated in order to maintain discipline and production. (J.A. 42) There was no

enforcement of the rule prior to or after the election. On May 19, 1967, an election was held, and the Union lost. On May 26, 1967, the Union filed objections to the election. The Regional Director on September 15, 1967, issued an order for hearing on all issues.

The matter came on for hearing, and was heard by the Trial Examiner, George J. Bott, who filed his decision finding against Petitioner, recommending that the election be set aside on the sole basis of the no-solicitation rule, to which Petitioner promptly filed its exceptions; and the National Labor Relations Board on May 1, 1968, adopted the findings, conclusions and recommendations of the trial examiner.

The Fifth Circuit Court of Appeals affirmed the order of the National Labor Relations Board's holding that there was substantial evidence of a violation of 8(a)(1) in promulgating a no-solicitation rule during working hours, on company premises, and concluded that, "The fact that there was no showing that the no-solicitation rule actually interfered with the Union's ability to communicate with the employees does not obviate this conclusion". A timely petition for rehearing was filed pertaining to the no-solicitation rule violation, and the same was denied on May 13, 1969.

REASONS FOR GRANTING THE WRIT

1. First Reason for Granting Writ

The question presented that of consideration of available alternative means of the Union to carry messages to the employees and the showing that the posted rule truly diminished the ability of the Union to communicate in a no-solicitation case during working hours on company premises, is of major importance to the employer, union and general counsel. The Fifth Circuit, District of

Columbia Circuit and Second Circuit are in conflict with a prior decision of this Court in *N.L.R.B.* v. *United Steelworkers of America*, 357 U.S. 357, 78 S.Ct. 1268, and the Sixth Circuit and Third Circuit.

Petitioner before the National Labor Relations Board and Fifth Circuit has continuously and vigorously raised the question of alternative means of the union to carry their messages to the employees and the failure of the general counsel to prove that the rule in question truly diminished the ability of the union to communicate. This Petitioner assumed a burden, although not required under *N.L.R.B.* v. *United Steelworkers of America* (Supra), and proved that the ability to communicate was not diminished. (J.A. 22, 27-28, 36) The Fifth Circuit citing the District of Columbia Circuit Case *United Steelworkers of America* v. *N.L.R.B.*, 393 F.2d 661 (1968) held that, "The fact there was no showing that the no-solicitation rule actually interfered with the Union's ability to communicate with the employees does not obviate this conclusion of a violation of 8(a)(1). See, e.g., United Steelworkers of America v. N.L.R.B., supra". *United Steelworkers of America* v. *N.L.R.B.* (Supra) held that:

> "In determining the validity of a no-solicitation rule, the availability of other avenues of communication is generally irrelevant".

The Second Circuit Case of *N.L.R.B.* v. *United Aircraft Corp., Pratt & Whitney Air Div.*, 324 F.2d 128 (1963) cited by the District of Columbia Circuit rejects, "the trilogy which forms Rockwell's foundation" in *N.L.R.B.* v. *Rockwell Manufacturing Co. (Du Bois Div.)*, 271 F.2d 109 (1959).

Petitioner contends that the question of available alternative means to carry union messages, and the showing

that the no-solicitation rule truly diminished the ability of the union to communicate, is a vital, controlling and ultimate question in a no-solicitation rule during working hours case. The general counsel, however, in their brief before the Fifth Circuit relied upon *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793, 65 S.Ct. 982 (1945) for authority that, "the availability of other avenues of communication is irrelevant". *Republic Aviation Corp.* v. *N.L.R.B.* (Supra) involves a promulgation and enforcement of a rule prohibiting solicitation, "of any type * * * in the factory or offices", and an employee was discharged for violating the rule on his own time during lunch period. This Court did not hold in *Republic Aviation Corp.* (Supra) as is contended by the Board that, "the availability of other avenues of communication is irrelevant".

Justice Frankfurter, delivering the opinion in *N.L.R.B.* v. *United Steelworkers* (Supra), concluded on Page 1272:

> "No attempt was made in either of these cases to make a showing that the no-solicitation rules truly diminished the ability of the labor organizations involved to carry their message to the employees. Just as that is a vital consideration in determining the validity of a no-solicitation rule, see Republic Aviation Corp. v. National Labor Relations Board, supra, 324 U.S. at pages 797-798, 65 S.Ct. at pages 985-986; National Labor Relations Board v. Babcock & Wilcox Co., supra, 351 U.S. at page 112, 76 S.Ct. at page 684, it is highly relevant in determining whether a valid rule has been fairly applied".

Following the Court's decision in United Steelworkers of America, the Sixth Circuit in *Armco Steel Corporation* v. *N.L.R.B.*, 344 F.2d 621 (1965), a no distribution rule case, and in *May Department Stores Company* v. *N.L.R.B.*, 316 F.2d 797 (1963), a no-solicitation rule case, held that

the question of alternative means to carry union messages were relevant. In alignment with the Sixth Circuit is the Third Circuit case of *N.L.R.B.* v. *Rockwell Manufacturing Co.* (*Du Bois Div.*), 271 F.2d 109 (1959).

The Fifth Circuit Court of Appeals in the case at bar in agreement with the District of Columbia Circuit and Second Circuit disregards, or considers irrelevant the showing of alternative means of the union to carry their messages to the employees as a vital consideration in determining the validity of a no-solicitation rule, and in determining whether a valid rule has been fairly applied. *Since the issue or question of alternative means of communication continually arises, the conflict of the Circuit Courts and this Court's decision in N.L.R.B.* v. *United Steelworkers* (*Supra*) *should be resolved and clarified.*

2. Second Reason for Granting Writ

The Fifth Circuit in its opinion found that Petitioner's no-solicitation rule during working hours was discriminatory because of solicitations among the employees ranging from candy sales for cub scouts to church donations. Assuming that such solicitation was with the knowledge and permission of Petitioner, which is denied, the Fifth Circuit's finding is in conflict with the Sixth and Tenth Circuit Court of Appeals. In *TRW, Inc., TRW Michigan Division* v. *N.L.R.B.*, 393 F.2d 771 (1968 Sixth Circuit), solicitations for charitable purposes, semiannual raffle by the Pioneer Club, sale of government bonds, and contribution to deceased fellow employees were not evidence that the rule was adopted for a discriminatory purpose. The Sixth Circuit expressing the view that Union solicitation by its very nature may cause argument and diversion among employees. In alignment with the Sixth Circuit is the Tenth Circuit's holding in the case of *Serv-Air, Inc.* v. *N.L.R.B.*, 395 F.2d 557, 560 (10 Circuit 1968), that the

forms of solicitation in question were beneficent acts and fall far short of establishing forbidden discrimination. *Is the Petitioner by publishing a no-solicitation rule during working hours on company premises forbidden to condone beneficent acts by the employees of candy sales for cub scouts and church donations?*

3. Third Reason for Granting Writ

Of exceptional importance is the question of whether during a posted no-solicitation rule an employer and/or a labor consultant can interview employees on the premises during working hours in order to discuss the pros and cons of a union in a noncoercive nature, and be in violation of 8(a)(1). In the opinion of the Fifth Circuit, such act was a violation of 8(a)(1).

The Fifth Circuit's result is in conflict with Section 8(c) of the National Labor Relations Act, and this Court's decision in *N.L.R.B.* v. *United Steelworkers*, 78 S.Ct. 1268 (1958). Section 8(c) of 29 U.S.C.A., Section 158, reads as follows:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this act, if such expression contains no threat of reprisal or force or promise of benefit".

In the case of *N.L.R.B.* v. *United Steelworkers* (Supra), there was at issue, an enforcement of a no-solicitation rule by an employer, who at the same time was engaging in anti-union solicitation. Under the circumstances in that case, which are equally applicable to Petitioner, this Court held that there was no unfair labor practice. Petitioner's case is stronger because *there was no enforcement;* no employees were disciplined, threatened or

discharged. (See the Entire Record) No employee of the union requested the employer to relax or make an exception to the rule.

No attempt was made to show that the no-solicitation rule truly diminished the ability of the labor organizations involved to carry their messages to the employees.

Petitioner's anti-union solicitation was a protected activity within the meaning of the Act, and this Court should grant this writ to clarify the rights of the employer during a promulgation of a no-solicitation rule, on company premises during paid working hours.

CONCLUSION

For the reasons stated, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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I, John H. Benckenstein, Attorney for Petitioner, do hereby certify that service of a copy of the foregoing Petition for a Writ of Certiorari has been made on Respondent and Solicitor General, Department of Justice, Washington, D.C. 20530, by mail in accordance with Rule 33 of the Rules of this Court. Date this 23rd day of June, 1969.

John H. Benckenstein